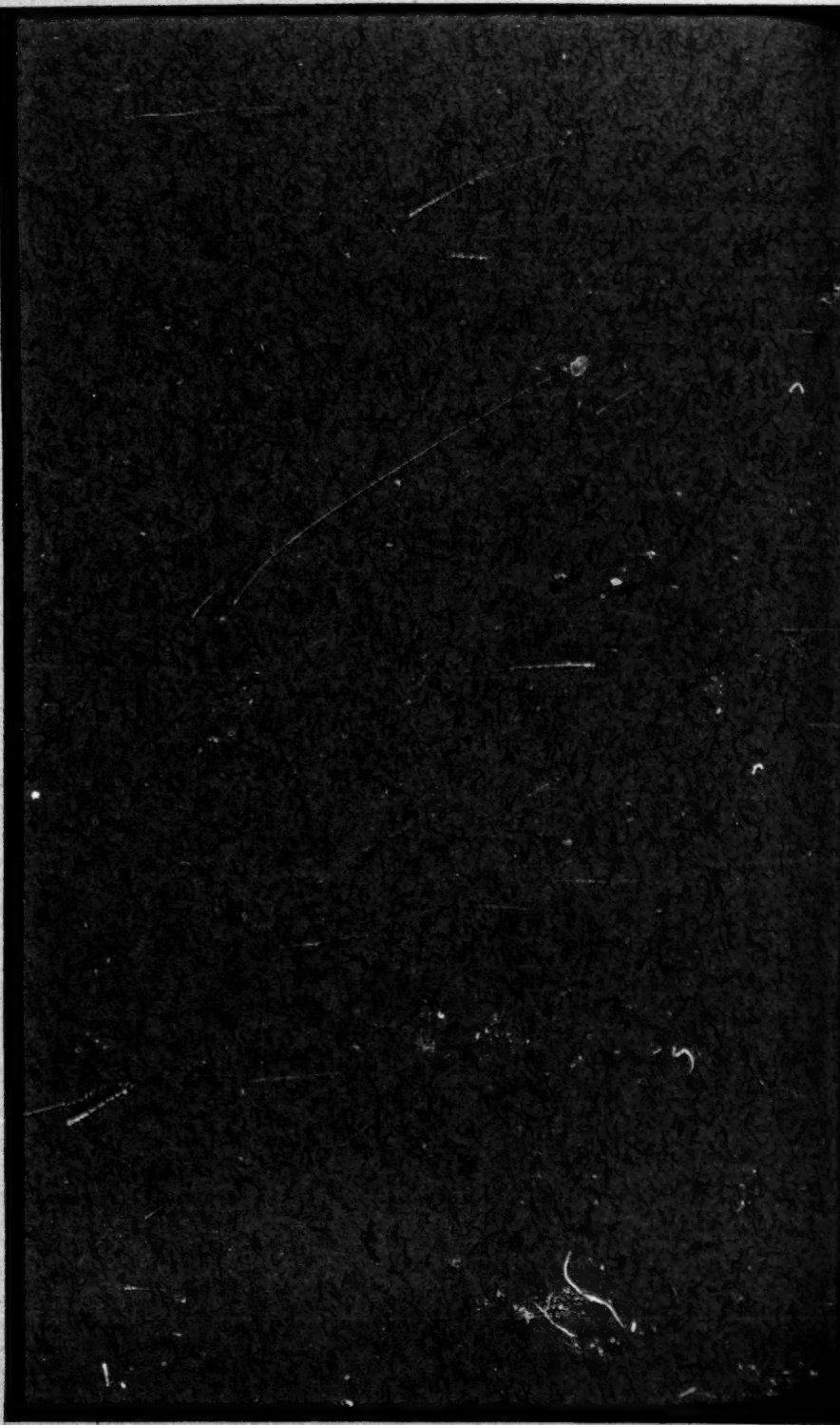

TABLE OF CONTENTS.

Counter-Statement of Question Presented 1

The Opinions of the Courts Below 2

Argument 3

I. The Decision Below Does Not Conflict With the Decision of the First Circuit in *O'Leary v. United States Lines* and Is Consistent With Prior Decisions of the Sixth Circuit and With Decisions of the Second, Third, Fourth and Fifth Circuits 3

A. The *Decision* Below Is Consistent With the *Decision* in *O'Leary v. U. S. Lines* and the *Dicta* Therein Relied On by Petitioner Was Expressly Repudiated by the Fifth Circuit in *Byrd v. Napoleon Avenue Ferry Company*, 227 Fed. 2d 958, Certiorari Denied May 1956, 351 U. S. 925 3

B. The Prior Decisions of the Sixth Circuit and Decisions of the Second, Third, Fourth and Fifth Circuits Have All Uniformly Applied the Same Rule as Applied in the Decision Below 6

II. The Question of Federal Law Involved Here Has Been Settled by the United States Supreme Court for Over Seventy Years Since *The Harrisburg*, 119 U. S. 199 (1886) and Most Recently Reaffirmed in *Levinson v. Deupree*, 345 U. S. 648 (1953) 7

III. The Decision Below Is Not in Conflict With Applicable Decisions of This Court 9

A. The Decision Below Is Not in Conflict With *Pope & Talbot v. Hawn* 9

B. The Decision Below Is Not in Conflict With *Cox v. Roth* 11

Conclusion 12

TABLE OF AUTHORITIES.

Cases.

Alaska, The, 130 U. S. 201 (1888) 8

Albert Duniors, The, 177 U. S. 240 (1899) 8

Butler v. Boston and Savannah Steamship Company, 130 U. S. 527 (1889) 8

Byrd v. Napoleon Avenue Ferry Company, 125 Fed. Supp. 573 (D. C. La., 1954), aff. 227 Fed. 2d 958 (C. A. 5), cert. den. 351 U. S. 925 ..... 3, 5, 6, 10

Continental Casualty Co. v. Skou, 200 Fed. 2d 246 (C. C. A. 4, 1952, cert. denied 345 U. S. 992) 7

Corsair, The, 145 U. S. 335 (1891) 8, 9

Cortes v. Baltimore Insular Line, 287 U. S. 367 (1932) 8

Cox v. Roth, 348 U. S. 207 (1955) 11, 12

Feige v. Hurley, 89 Fed. 2d 575 (1937) 6

Garrett v. Moore-McCormack, 317 U. S. 239 (1942) 9, 10

Graham v. Luci, 206 Fed. 2d 233 (C. C. A. 5, 1953) 7

Harrisburg, The, 119 U. S. 199 (1886) 7, 9

Hutchinson v. Dickie, 162 Fed. 2d 103 (1947) 6

Just v. Chambers, 312 U. S. 383 (1940) 5, 9

Klingseisen v. Costanzo Transportation Company, 101 Fed. 2d 902 (C. C. A. 3, 1939) 7

Knickerbocker Ice Company v. Stewart, 253 U. S. 149 (1920) 11

LaBourgogne, 210 U. S. 95 (1907) 8

Lee v. Pure Oil Company, 218 Fed. 2d 711 (1955) ... 6

Levinson v. Deupree, 345 U. S. 648 (1953) 7, 8, 9

Lindgrenn v. United States, 281 U. S. 38 (1920) 8

Norwalk, City of, 55 Fed. 106 5

O'Leary v. U. S. Lines Company, 215 Fed. 2d 708 (1954), cert. denied 348 U. S. 939 (1955) 3, 5, 6

Pipe & Talbot v. Hawn, 346 U. S. 406 (1953) 9, 10

Puleo v. H. E. Moss & Co., 159 Fed. 2d 842 (C. C. A. 2, 1947, cert. denied 331 U. S. 847) 7

Quinette v. Bisso, 136 Fed. 825 (C. C. A. 5, 1905, cert. denied 199 U. S. 606) 7

Robinson v. Detroit & C. Steam Nav. Co., 73 Fed. 883 (1896) 6

Southern Pacific Company v. Jensen, 244 U. S. 205 (1916) 11

Standard Dredging Corporation v. Murphy, 319 U. S. 306 (1942) 11

Western Fuel Company v. Garcia, 257 U. S. 233 (1921) 9, 10

Statutes.

28 U. S. C. A. 1333 10

46 U. S. C. A. 688 11

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 947.

CARL NIEPERT,
an Individual and as Executor of the Estate of
Dorothy Niepert, Deceased,
Petitioner,

vs.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

COUNTER-STATEMENT OF QUESTION PRESENTED.

There being *no* Federal Admiralty right of recovery for wrongful death occurring on the Great Lakes within the territorial limits of Ohio, must the Federal Admiralty Court in affording another forum (with the Ohio state courts) for the enforcement of the *state created* right of recovery for wrongful death under the Ohio Wrongful Death Act, since the accident occurred on navigable waters, apply the same substantive rules of contributory negligence that prevail in the Ohio courts in actions under the Ohio statute?

THE OPINIONS OF THE COURTS BELOW.

Petitioner's wife was drowned when petitioner rammed the boat, which he was piloting, and in which his wife was a passenger, against the pier of respondent just off the shores of Lake Erie within the territorial limits of Ohio. It was stipulated before the Court of Appeals that the trial judge's finding that petitioner was guilty of contributory negligence proximately contributing to the death of his wife was "true and accurate and without error."

The sole issue before the Court of Appeals for the Sixth Circuit was whether this negligence of the petitioner, which would have concededly barred any recovery by him in the Ohio courts if he had brought his action in the state court, should likewise bar his recovery in the Federal Admiralty Court where he had chosen to file his action. The Federal Admiralty Court in this case afforded a forum along with the state courts, for the enforcement of the Ohio Wrongful Death Statute. This was solely because the accident occurred on navigable waters, and not because any admiralty right of recovery was being recognized.

The Sixth Circuit, following the explicit and consistent decisions of this Court since 1886, its own previous decisions since 1896 and the concurring decisions of the Second, Third, Fourth and Fifth Circuits, held that there was no general, inherent admiralty right of recovery for wrongful death even when occurring on navigable waters, and no federal statute creating such an admiralty right of action for death occurring on the Great Lakes in territorial waters of the State of Ohio. And since the rights sought to be enforced, as this uniform body of admiralty federal decisions has long established, arose *exclusively* from *state* law, it must be measured by the *substantive law of the state* creating the right of recovery.

Since the contributory negligence of the petitioner would have barred his recovery if he had brought this action in the Ohio courts, it barred his recovery in the Federal Admiralty Court. The mere fact that the admiralty court would provide a concurrent forum with the state courts for the enforcement of the *state created right of recovery* was no basis for applying, as petitioner contended, the rule of comparative negligence usually applied by the admiralty court when enforcing *a right created by the admiralty or maritime law.*

ARGUMENT.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THE FIRST CIRCUIT IN O'LEARY v. UNITED STATES LINES AND IS CONSISTENT WITH PRIOR DECISIONS OF THE SIXTH CIRCUIT AND WITH DECISIONS OF THE SECOND, THIRD, FOURTH AND FIFTH CIRCUITS.

As the first reason for granting the writ, petitioner asserts that the decision below is in conflict with the decision of the Court of Appeals for the First Circuit in *O'Leary v. U. S. Lines Company,* 215 Fed. 2d 708 (1954), cert. denied 348 U. S. 939 (1955).

A. The decision below is consistent with the decision in O'Leary v. U. S. Lines and the dicta therein relied on by petitioner was expressly repudiated by the Fifth Circuit in Byrd v. Napoleon Avenue Ferry Company, 227 Fed. 2d 958, certiorari denied May 1956, 351 U. S. 925.

The *O'Leary* case was an action for wrongful death occurring on navigable waters brought in the admiralty court in Massachusetts under the Massachusetts Wrongful Death Act. Judgment was rendered against the plaintiff

by the trial court and this was affirmed on the grounds that *no negligence by the defendant had been established.* For its *decision*, therefore, it was not necessary for the court to determine whether to apply the admiralty or Massachusetts rule to the asserted contributory negligence of the plaintiff's decedent.

It is true that in the course of his opinion Judge Woodbury (Judge Hartigan dissented) discussed the effect of contributory negligence in an action for wrongful death brought in the admiralty court but predicated upon a state statute. He suggested that it seemed "incongruous" to have the law of comparative negligence applied to actions of the personal representative for the personal injury and suffering of the decedent, being an admiralty right of recovery, but to apply to the Wrongful Death action the state contributory negligence doctrine as an absolute bar to recovery.

Judge Woodbury well recognized, however, that this expression was no more than dicta:

> "In this case, however, we do not, and *indeed we cannot except by dictum, pass upon the question of the law applicable to count one.* The reason for this is that we do not see how on the evidence a finding of the defendant's causal negligence could reasonably be made under *either* local or maritime law. Wherefore *we do not reach the question of contributory negligence* wherein local and maritime law differ radically in that under the former such negligence provides a complete defense whereas under the latter it serves only to mitigate damages." (p. 712; emphasis supplied.)

Judge Hartigan in his dissent pointed out that just as severe incongruities would result from applying the admiralty doctrine of comparative negligence to the wrong-

ful death action created by the state statute as exist under the present practice:

> "Finally, in terms of incongruities, if, as the majority opinion suggests, general maritime law determines the liability and state law determines the remedy, then parties asserting rights under a state wrongful death statute arising from a maritime tort may obtain preferential treatment as compared with those asserting rights under the same statute because of a non-maritime tort. See Stevens, Erie R. R. v. Tompkins and The Uniform General Maritime Law, 64 Harv. L. Rev. 246, 266 (1950)." (pp. 714-715)

Furthermore, the incongruity to which Judge Woodbury referred in the *O'Leary* case is a type of incongruity which the courts have long recognized and accepted. As noted by this Court in *Just v. Chambers*, 312 U. S. 383 (1940), "there are numerous instances in which the general maritime law has been modified or supplemented by state action." (p. 388) Indeed, the court made specific reference (pp. 389-390) to "the many [eleven in fact] instances in which state action had created new rights, recognized and enforced in admiralty" according to the state law, which were set forth in the *City of Norwalk*, 55 Fed. at 106.

The most recent application, other than the instant case, of the well-established admiralty doctrine that where the admiralty court is enforcing a state created right of action for wrongful death, the admiralty court applies the substantive law of the state which created the right of recovery is *Byrd v. Napoleon Avenue Ferry Company*, 227 Fed. 2d 958, cert. denied, 351 U. S. 925. In that case the Fifth Circuit, adopting the opinion of the District Court, 125 Fed. Supp. 573, referred to the expression of opinion of the two judges of the First Circuit in the

O'Leary case, but expressly repudiated it. (125 Fed. Supp. at pp. 577-578) After a careful analysis of the decisions of this Court, and of the uniform jurisprudence in the Circuit Courts, it was there concluded:

> "It is this court's conclusion, therefore, that the right to recover for maritime tort not involving death and occurring within the borders of a state is governed by the general maritime law, *and the right to recover under a state wrongful death statute for a maritime tort is governed by the law of the state.*" (p. 578; emphasis supplied)

This Court did not consider it necessary to grant certiorari to review this decision which applied the very principles disputed by the petitioner here. 351 U. S. 925.

B. The prior decisions of the Sixth Circuit and decisions of the Second, Third, Fourth and Fifth Circuits have all uniformly applied the same rule as applied in the decision below.

For over seventy years the United States Circuit Courts have been applying the principle applied in the decision below, and have done so specifically to instances where the defense of contributory negligence has been raised in wrongful death actions in the admiralty court. Without exception these courts have held that it is the substantive law of the state as to the effect of this contributory negligence that is to be applied, and not the admiralty rules applied in actions where the right of recovery is granted by the admiralty law.

The prior decisions of the Sixth Circuit were *Robinson v. Detroit & C. Steam Nav. Co.*, 73 Fed. 883 (1896); *Feige v. Hurley*, 89 Fed. 2d 575 (1937); *Hutchinson v. Dickie*, 162 Fed. 2d 103 (1947); *Lee v. Pure Oil Company*, 218 Fed. 2d 711 (1955).

Uniformly the same rule has been followed in other circuits: *Puleo v. H. E. Moss & Co.*, 159 Fed. 2d 842, 845 (C. C. A. 2, 1947, cert. denied 331 U. S. 847); *Klingseisen v. Costanzo Transportation Company*, 101 Fed. 2d 902 (C. C. A. 3, 1939); *Continental Casualty Co. v. Skou*, 200 Fed. 2d 246 (C. C. A. 4, 1952, cert. denied 345 U. S. 992); *Quinette v. Bisso*, 136 Fed. 825, 838 (C. C. A. 5, 1905, cert. denied, 199 U. S. 606); *Graham v. Lusi*, 206 Fed. 2d 233 (C. C. A. 5, 1953).

II. THE QUESTION OF FEDERAL LAW INVOLVED HERE HAS BEEN SETTLED BY THE UNITED STATES SUPREME COURT FOR OVER SEVENTY YEARS SINCE THE HARRISBURG, 119 U. S. 199 (1886), AND MOST RECENTLY REAFFIRMED IN LEVINSON v. DEUPREE, 345 U. S. 648 (1953).

The issue in this case is not, as petitioner contends, a question of federal law, which has never been settled by this Court.

As early as *The Harrisburg*, 119 U. S. 199 (1886), it was established that no action for wrongful death "will lie in the courts of the United States under the general maritime law." (p. 213)

This Court held, however, in that decision, that the admiralty court would provide a forum to enforce the state created right of action for wrongful death where the accident happened upon navigable waters, but at the same time stated categorically that "if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence" by the state creating the right of action. (p. 214) Therefore, it was held in that case that the admiralty court could not apply any federal or admiralty statutes of limitation but must apply the *state statute* of limitations.

Just four years ago in *Levinson v. Deupree*, 345 U. S. 648 (1953), this Court stated, without equivocation, as it has repeatedly since 1886: "The maritime law does not allow recovery for wrongful death." (p. 650)

In that decision this Court, affirming a decision of the Sixth Circuit in 199 Fed. 2d 760, held that only where "procedural niceties," such as amendments to libels were involved, could the admiralty court apply admiralty jurisprudence, and not the substantive law of the state in a wrongful death action based upon a state statute.

The Court, reaffirming its earlier decisions, emphasized that the admiralty court, in enforcing a state wrongful death statute, is simply a "forum provided by another jurisdiction" and "such forum must look to the local law" for its *substantive* rules, although it should not do so for its *procedural* rules. The admiralty court could only enforce "the limited scope given to the right by the local law which created it." (p. 651) This Court stated the basis upon which the admiralty court enforces the state wrongful death statute:

> "In the absence of congressional action, the court adopted and enforced the obligation created by Kentucky as it would one originating in any foreign jurisdiction * * * *And it was bound to enforce it as it found it* * * *." (pp. 651, 652; emphasis supplied.)

That there is no admiralty right of recovery for wrongful death has been time upon time reasserted by this Court: *The Alaska*, 130 U. S. 201, 209 (1888); *Butler v. Boston and Savannah Steamship Company*, 130 U. S. 527, 555 (1889); *The Corsair*, 145 U. S. 335, 344 (1891); *The Albert Dunlors*, 177 U. S. 240, 259 (1899); *La-Bourgogne*, 210 U. S. 95, 139 (1907); *Lindgren v. United States*, 281 U. S. 38, 47 (1920); *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 381 (1932).

And this Court has held in a long array of decisions between *The Harrisburg* and *Levinson v. Deupree* that the admiralty court, permitted as it is to enforce the state created right of action for wrongful death, must, however, enforce it as it would be enforced in the state courts in which the right was created: *The Corsair*, 145 U. S. 335 (1891); *Western Fuel Company v. Garcia*, 257 U. S. 233 (1921); *Just v. Chambers*, 312 U. S. 383, 388 (1940); *Garrett v. Moore-McCormack*, 317 U. S. 239, 245 (1942).

III. THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The decision below is not in conflict with Pope & Talbot v. Hawn.

Petitioner asserts that *Pope & Talbot v. Hawn*, 346 U. S. 406 (1953), establishes the doctrine that in *any case* in which admiralty jurisdiction is invoked, even though only to enforce a state created right of action, the general admiralty jurisprudence, including the rule of comparative negligence, is to be applied.

Pope & Talbot was not, however, a wrongful death case, nor a case predicated on a *state created right of recovery*. It was an action to enforce an *admiralty right of recovery* by a carpenter for injuries sustained while working on a ship berthed in navigable waters in Pennsylvania. This Court emphasized that the claim was not one based upon any state statute or right of action, but was a right of recovery based upon federal maritime law:

> "And Hawn's complaint asserted no claim *created by or arising out of Pennsylvania law*. His right of recovery for unseaworthiness and negligence is *rooted in federal maritime law*." (p. 409; emphasis supplied.)

Being an admiralty right of action, the admiralty rule of comparative negligence applied. This Court has re-

peatedly held, however, as established in the cases cited above, that there is *no* admiralty right of action for wrongful death. Unlike the claim in *Pope & Talbot*, the claim for wrongful death of the petitioner here was "created by or arising out of" the statutes of Ohio.

It was expressly held in *Byrd v. Napoleon Avenue Ferry Company*, 125 Fed. Supp. 573 (D. C. La., 1954), which was affirmed by the Fifth Circuit on the opinion of the District Court, 227 Fed. 2d 958 and Certiorari denied by this Court last year, 351 U. S. 925, that *Pope & Talbot* did not change the long established rule that in enforcing the state wrongful death statutes, the admiralty court applies the substantive rules of the state in which the right was created.

The court pointed out that Mr. Justice Black, who authored the opinion in *Pope & Talbot*, was also the author of the statement in *Garrett v. Moore-McCormack*, 317 U. S. 239 (1942), that "admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the state." (p. 245)

As authority for this position, Mr. Justice Black had cited *Western Fuel Company v. Garcia*, 257 U. S. 233 (1921), in which this Court had again reaffirmed its earlier position that there was no admiralty right of action for wrongful death, and that the admiralty court while it could afford a forum for the enforcement of a state created right of action for wrongful death occurring on navigable waters had to apply the state substantive law.

It should be noted here that in *Western Fuel Company v. Garcia* the same arguments (257 U. S. at 236) based on the so-called "savings clause" (28 U. S. C. A. 1333) and of the supposed necessity of "uniformity" in

admiralty administration were advanced as urged by the petitioner here, and on the authority of the same cases, such as, *Southern Pacific Company v. Jensen*, 244 U. S. 205 (1916) and *Knickerbocker Ice Company v. Stewart*, 253 U. S. 149 (1920). The acceptance of state substantive law in enforcing the state civil action right of recovery for wrongful death, it was held, however, was not inconsistent with the "savings clause" or these decisions. (257 U. S. at 241-243) And, as was stated in *Standard Dredging Corporation v. Murphy*, 319 U. S. 306 (1942), "Indeed, the *Jensen* case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws." (p. 309)

B. The decision below is not in conflict with Cox v. Roth.

Petitioner contends that *Cox v. Roth*, 348 U. S. 207 (1955) "is also in point" in support of petitioner's claim that the Sixth Circuit erred in the decision below. The fact is, however, that *Cox v. Roth* was not an action predicated upon any state statute as is the instant case. It was an action for the wrongful death of a seaman, brought under the express terms of the Federal Jones Act, 46 U. S. C. A. 688, against the estate of the deceased tortfeasor. As established by this Court in its first sentence of the opinion: "The main question presented in this case is whether an action *under the Jones Act* survives the death of the tortfeasor." (p. 207; emphasis supplied.)

That this Court in *Cox v. Roth* was not in any way intending to express any opinion in regard to the long established rule that there is no admiralty action for wrongful death, and that the admiralty court in enforcing the state created right of action for wrongful death must apply the state substantive law is clearly evidenced by its

failure even *to cite a single one* of the long array of cases in which this Court has unequivocally set forth these principles. Yet, the petitioner would have it that *Cox v. Roth* overrules them all. The plain fact is, as the Court below correctly concluded, *Cox v. Roth* has no application at all to the instant case.

CONCLUSION.

The petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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